

**Survey of Federal Departments and Agencies on
Use of Environmental Conflict Resolution**

Prepared by the U.S. Institute for Environmental Conflict Resolution
on behalf of the
Interagency ECR Initiative
August 25, 2004

Please circulate these questions on use of environmental conflict resolution (ECR)¹ within your department or agency to headquarters and field offices and to legal departments and program offices as appropriate. The deadline for return of surveys is **September 30, 2004**. For further information on the survey or this ECR initiative, please contact Kirk Emerson or Cherie Shanteau at (520) 670-5299 or Dinah Bear at (202) 395-7421. Please return responses by email to Pat Mahalish at mahalish@ecr.gov.

Department/Agency Responding: Energy

Name of Official Responding: Phyllis Hanfling

Position: Director, Office of Dispute Resolution

Contact Information: phone (202) 586-6972 email phyllis.hanfling@hq.doe.gov

Date Submitted: 9/28/04

1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?

The Office of Dispute Resolution (ODR) is in the Office of General Counsel. It is a fully funded office with 4-1/2 staff positions. The Director has broad responsibility for policy, program development, training, and consulting for all of DOE and its contractors. She also directly manages the technology transfer ombuds program. One staff member manages the Headquarters Mediation Program for workplace disputes, while a third is primarily responsible for the Contractor Legal Management System. However, because the agency is decentralized, ADR activity may be initiated by individual program offices without consultation with the ODR.

¹ Environmental Conflict Resolution (ECR) is defined for the purposes of this interagency initiative and this survey to mean assisted multi-party negotiations in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. These processes differ from conventional agency decision making by engaging affected interests and agency decision makers more directly in collaborative problem solving. Assistance from impartial third parties (whether internal or external facilitators or mediators) adds value when addressing complex, high conflict or low trust settings. ECR processes can be applied at the beginning of a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicting interests between federal, state, local, tribal and industry parties where a federal agency has ultimate responsibility for decision-making. The principles that guide ECR are derived from professional experience and research in interest-based bargaining, alternative dispute resolution and environmental mediation, consensus building, and collaborative management.

2. **Is there another person in your department/agency specifically assigned responsibility for ECR?** No
3. **How is ECR funded?**
- a. **Are there specific appropriations focused on ECR?**
 - b. **Are ECR costs considered administrative costs charged to other program costs?**
 - c. **Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?**
- There is not much of this done in this agency. If it is, as far as this office is aware, it comes from program money of the individual program office.
- a. No.
 - b. No.
4. **What are ECR funds used for?** There are no specific funds.
- a. **ECR program development, education and advocacy**
 - b. **Specific ECR projects**
 - c. **Other**
5. **What other resources are available to support ECR?** Has to be taken from existing program funds.
6. **What specific incentives/disincentives exist within your Federal agency for using ECR?**
Lack of knowledge about its existence and value, lack of support from senior management.
7. **What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, The National Environmental Policy Act)?**
Don't think that would be a problem if there was agency interest.
8. **When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?** Travel is a problem, but if this was deemed important enough, money could probably be found.
9. **What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?**
10. **Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?** No.

- 11. Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:**
 - Any benefits derived from using ECR; and,
 - Any costs associated with using or not using ECR.
- 12. If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.**

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Department/Agency Responding: U.S. Department of the Interior

Official Responding: Elena Gonzalez

Position: Director, Office of Collaborative Action and Dispute Resolution

Contact Information: phone 202-327-5352 email Elena_Gonzalez@ios.doi.gov

Date Submitted: Sept. 30, 2004

- 1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?**

Current State:

The designated Dispute Resolution Specialist (DRS) in the U.S. Department of the Interior (DOI) is the Director of the Office of Collaborative Action and Dispute Resolution (CADR) located within the Office of the Secretary under the Assistant Secretary for Policy, Management and Budget. The DRS is a full-time career position (GS-0301-15).

The CADR office has a total of 5 FTEs: one GS-15 Office Director; three GS-14 program managers; and one GS-9 administrative support specialist. Currently, the Director and two

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GS-14 program manager positions are funded. Another senior level employee is on a non-reimbursable detail and manages the Native American program area for the CADR office, and is acting as the Bureau Dispute Resolution Specialist (BDRS) for the BIA. The CADR office supplements its staff using details whenever possible, and always works with teams of interested individuals on all of its cross-cutting projects and initiatives.

The CADR office carries out the DRS function under the Administrative Dispute Resolution Act (ADRA), and is responsible for promoting full implementation of the Department's ADR policy, which encourages the use of collaborative decision-making, alternative dispute resolution and negotiated rulemaking processes throughout the Department. Application of these tools is encouraged in all areas of the Department's work: workplace, procurement, programmatic, and regulatory/public policy. The CADR office serves as the Department's centralized repository of policy, guidance and information on the appropriate use of these tools, and provides technical assistance and consultations on assessment, process and program design, neutral selection, contracting for ADR services, and monitoring and evaluating results.

To carry out its function, the CADR office established the Interior Dispute Resolution Council (IDRC), comprised of designated Bureau and Office Dispute Resolution Specialists. The IDRC includes representatives from the 8 bureaus and the Office of the Solicitor, the Office of Regulatory Affairs, the Office of Policy Analysis, the Office of Hearings and Appeals, and the Office of Acquisition and Property Management. The CADR office works in collaboration with the IDRC to develop Department-wide policies, guidance, quality standards, tools for tracking and evaluation, mechanisms for accessing qualified neutrals, promotional materials, educational forum and targeted skills training to promote and advance the appropriate use of ADR throughout DOI. This approach encourages effective coordination across all bureaus and offices.

Each bureau is expected to replicate the CADR model within their own organization by designating a full-time career BDRS with parallel organizational placement and function within the bureau, and establishing an internal team or network of bureau representatives to work collaboratively on ADR issues.

Not every bureau has agreed to designate a full time BDRS, as requested by the CADR office, but each bureau has designated someone to serve in this capacity for their bureau and to work on the IDRC. Current BDRS positions are as follows:

Bureaus:

Bureau of Indian Affairs (BIA):

Acting full-time senior level employee in CADR office on a long-term detail.

Bureau of Land Management (BLM):

Full-time GS-14 (Bureau Dispute Resolution Manager) in the Office of Assistant Director for Renewable Resources and Planning, with a full-time dispute resolution specialist, GS-9/11/12.

Bureau of Reclamation (BOR):

Full-time GS-15. (currently vacant)

U.S. Fish and Wildlife Service (FWS):

Collateral duty GS-13 in the Division of Policy and Directives Management.

Minerals Management Service (MMS):

Collateral duty GS 13 in the Office of Policy and Management Improvement.

National Park Service (NPS):

Collateral duty GS-13 in the Office of Human Resources.

Office of Surface Mining (OSM):

Collateral duty GS-15, Chief, Office of Planning, Analysis and Budget.

U.S. Geological Survey (USGS):

Part-Time GS-15 with two full-time ADR staff positions, Office of Ethics and ADR.

Other Departmental Offices:

Office of the Solicitor (SOL):

Collateral duty, SES, Associate Solicitor for the Division of Administration.

Office of Hearings and Appeals (OHA):

Part-time, GS-15.

Office of Regulatory Affairs (ORA):

Collateral duty, GS-14.

Office of Policy Analysis (OPA):

Collateral duty, GS-13.

Office of Acquisition and Property Management (PAM):

Collateral duty, GS-13.

Several Bureaus and Offices, including the Bureau of Reclamation and the Bureau of Land Management, the Office of Hearings and Appeals, and the Office of the Solicitor, have established their own internal ADR teams or networks to work under the BDRS' leadership within their organizations, just as the IDRC works with the CADR office at the Departmental level. This promotes greater communication and coordination between DC and the field and internal collaboration within bureaus and offices. Through this organizational structure, the

Dispute Resolution Specialist has established a capacity to work across bureaus and offices and to penetrate within bureaus and offices and into the field.

Background: From 1994 until 2000, the designated Dispute Resolution Specialist for DOI was the Director of the Office of Hearings and Appeals. The DRS function was a collateral duty and the Department's ADR efforts were highly de-centralized and uncoordinated. The current DRS organizational placement, function, and supporting organizational structure are the result of the findings of an extensive ADR review undertaken in early 2001. The Department established an interagency team to review the Department's ADR policies, programs and organizational structure, and recommend an action plan for strengthening coordination and improving ADR efforts throughout DOI. The team conducted an extensive internal review process and benchmarked 22 other federal agencies to:

- a. determine the optimal organizational placement of the DRS' function;
- b. develop an organizational framework to support full implementation of the Department's ADR policy under the leadership of the DRS;
- c. clarify the appropriate allocation of resources to support the DRS function and implementation of the Department's ADR policy;
- d. identify ways to reduce administrative redundancy, and improve customer service and the quality of ADR programs.

The criteria identified for determining the optimal placement of the DRS function were:

- Access to senior management
- Neutrality
- Independence
- Visible and accessible to all users
- Support - champions and resources

Copy of Report on ADR review attached: "*ADR at a Crossroads: A Review and a Plan for Action.*" Attachments B-I available on request.

2. Is there another person in your department/agency specifically assigned responsibility for ECR?

No. The CADR office works in close cooperation with the Office of the Solicitor and coordinates its work with all bureaus and offices of the Department, but the CADR office was established within the Office of the Assistant Secretary for Policy, Management and Budget to provide the Department's leadership on ADR, including ECR. The Department's policy on ADR covers all applications of ADR and collaborative decision-making processes, including environmental and natural resource applications. The CADR office and the IDRC are responsible for leading and coordinating DOI's efforts on ECR. The CADR office strives to model good collaborative process in how it approaches its mission and in how it functions.

Under Secretary Norton's leadership, the Department of the Interior has also established a team responsible for promoting the Secretary's 4 C's philosophy, and the CADR office is one member of that team and is careful to avoid duplication of efforts. The "4 Cs, Partnerships and Collaborative Action" team is comprised of field and headquarters

representatives of all bureaus and Departmental offices and has focused its efforts on furthering the use of upstream partnerships and community-based approaches to planning, managing and problem-solving.

3. How is ECR funded?

- a. Are there specific appropriations focused on ECR?**
- b. Are ECR costs considered administrative costs charged to other program costs?**
- c. Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?**

- a. There generally are not specific appropriations focused on ECR, although there may be some exceptions to this general rule.
- b. ECR costs are frequently charged to other program costs.
- c. In most instances, DOI bureaus and offices fund individual ECR projects, rather than funding an ECR/ADR program.

The operation of the CADR office is funded through the DOI's Departmental Management Account for the Office of the Secretary. The appropriations provided to this office fund ECR efforts as well as other areas of ADR, including other program areas, workplace, procurement, regulatory and public policy issues. The CADR office provides seed money to leverage funds and support for significant cross-cutting "demonstration projects" or "pilot projects" and selectively funds other Department-wide initiatives to increase and improve the use of ADR processes (e.g. tracking system and evaluation of ECR cases; education and awareness training).

As a general rule, DOI's bureaus and offices do not designate appropriations focused on ECR and collaborative decision-making processes, but often the office involved in an ECR process will at least share the associated costs with the other parties agreeing to participate in the process. The general policy concerning funding for an individual ECR process or an ECR program is that the bureau or office participating in the process or designing the program must find the funding to support it. This is considered an operational cost to the office/s responsible for handling the case/s or issue/s being addressed through ECR.

DOI bureaus generally allocate funding in support of a specific ECR project. However, the BLM and the BOR have provided annual budgets to support the Bureau Dispute Resolution Specialist functions, which could be used to support ECR. In both instances, the funding was not sufficient to fund all of the bureaus' costs related to ECR. Each Bureau Dispute Resolution Specialist (BDRS) used the money for training, education, and promotional materials and to support demonstration cases, or pilot projects.

4. What are ECR funds used for?

- a. ECR program development, education and advocacy**
- b. Specific ECR projects**
- c. Other**

CADR funding is used for program development, education, advocacy, specific ECR projects and cross-cutting initiatives.

CADR's work falls in to three major categories:

1. Build infrastructure to support use of CADR processes, by establishing policies, mechanisms for acquiring neutrals, common tracking and evaluation systems.
2. Improve capacity of DOI employees to initiate and participate in CADR processes, through dissemination of information, guidance, tools, education and training, coaching and assistance with referrals and selection of qualified neutrals.
3. Increase use of CADR processes, through advocacy, identifying and developing pilot and demonstration projects, and providing assistance with system and process design.

As described earlier, bureaus use ECR funds primarily for training, for projects or cases and for implementing solutions achieved through an ADR process (e.g. an agreement to use an adaptive/collaborative approach to monitoring). There is a need for greater commitment of resources to support capacity building efforts both for government and for communities, to enhance the ability to participate in these processes.

5. What other resources are available to support ECR?

Strong departmental policy on ADR since 1994.

Training and education through Department and bureaus.

CADR website – an information clearinghouse.

IDRC with roles as CADR liaison and experts in their respective bureaus and offices responsible for establishing their own CADR networks within their organizations. e.g. SOL ADR working group; BLM ADR Advisory Council with three sub-groups; BOR ADR Advisors. The IDRC members serve as the BDRS for their bureaus and departmental offices (as described earlier).

The Solicitor's Office ADR working group. (copy of establishment memo attached).

CADR and Bureau Interagency Agreements with the USIECR.

The Department of the Interior's 4Cs, Partnerships and Collaborative Action team.

Interagency ADR Working Group Steering Committee comprised of Federal agency Dispute Resolution Specialists and the Civil Enforcement and Regulatory and Public Policy sections of the Interagency ADR Working Group.

The Environmental Conflict Resolution Roundtable sponsored by the USIECR.

National Roster of Consensus-building and Dispute Resolution practitioners and Native Practitioner Network.

6. What specific incentives/disincentives exist within your Federal agency for using ECR?**Incentives:**

Support of senior level champions in the Office of the Secretary, the Office of the Solicitor, the Offices of the Assistant Secretaries, and Bureau leadership.

Secretary's 4 Cs philosophy and inclusion of 4 Cs performance measures in SES performance standards.

Secretary's memo of April 2001 on the importance of effective conflict management (copy attached).

CADR office and BDRS available to provide early assistance without additional cost.

Avoidance of delays and cost associated with litigation when feasible.

Disincentives:

Difficulty in finding funds, staff time and senior commitment to support long-term projects.

Continuing resistance from some attorneys and some managers to use of process. Fear of losing control or abdicating responsibility.

Lack of resources available to support capacity building both for government employees and for other parties.

Lack of understanding of value/benefits of appropriate use.

Insufficient collection of data and evaluation of process to demonstrate value of ECR processes, primarily anecdotal to date and stories may or may not be good examples of ADR.

Judgment fund cannot be accessed unless settling litigation, so may have concerns over funding implementation of agreements reached through early collaborative decision-making process.

The budget process does not provide any rewards or incentives for choosing to work this way.

7. What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, The National Environmental Policy Act)?

The Federal Advisory Committee Act (FACA) is viewed by many DOI managers at all levels of the agency as posing challenges for collaborative decision-making processes and for ADR processes. Some believe this "fear of FACA" is warranted and others suggest it is an excuse for not engaging all interested stakeholders in contentious public policy decisions.

The Administrative Dispute Resolution Act (ADRA) is more focused on downstream litigation and issues in controversy, rather than on upstream opportunities to prevent and manage conflict through collaborative processes. The confidentiality provided under the ADRA is limited and in designing processes, parties must be careful about knowing the limits of the protection provided under the ADRA. The ADRA exceptions to the Federal Acquisition Regulations (FAR) are not well understood by procurement offices and can hinder or delay parties' ability to negotiate an agreement on an acceptable third party neutral.

The Negotiated Rulemaking Act is not well known.

The National Environmental Policy Act endorses collaboration as the preferred approach to addressing environmental concerns, but agencies are still more comfortable using the traditional scoping process rather than designing a collaborative process to address environmental concerns.

The Alternative Dispute Resolution Act of 1998 applies to cases in Federal courts and reflects the full spectrum of opportunities to use ECR processes.

The Graves Repatriation Act and the National Historic Preservation Acts require consultation – these are usually triggered by “land” actions. Is this ECR?

8. When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?

Travel costs, especially for attorneys, and sometimes for bureau employees depending on state of budgets and the time of year. The Office of the Solicitor in DOI generally does not have funds for travel expenses or for training. The travel of bureau employees is curtailed as budgets tighten, particularly at the end of the fiscal year.

Time required for someone with decision-making authority to participate in the process and also to do the necessary internal work of coordinating within the agency and keeping everyone apprised and engaged in vetting the proposed solutions developed during the negotiation process.

Cost of using a skilled third party neutral; and issues over contracting neutral services and transferring funds when parties agree to share costs.

Parties' lack of capacity to participate effectively and difficulty of getting participants trained in advance.

9. What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?

Hydro-re-licensing cases; various permitting cases; natural resource damages act cases; development of resource management plans; and Tribal consultations on ECR issues.

A survey of all Solicitors' offices, and a conflict inventory for each bureau, are underway now and will generate additional input on this question.

10. Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?

Yes. The CADR office and the IDRC and SOL have initiated several demonstration and pilot projects to increase the use of ECR, including:

Early Case Assessment Program for Office of the Solicitor

Conflict Inventory for each bureau

Interior Board of Land Appeals Pilot Project

Interior Board of Indian Appeals case referrals to CADR office

Cases being identified in BLM, NPS and BIA

BIA pilot projects being designed for fee to trust land acquisition and Tribal governance disputes

SOL survey of attorneys

Development of tools to assist in employees in deciding when and how to use ECR processes

Workshops and Training – negotiated rulemaking; government to government consultation; collaboration framework tools; ADR in the Courts for SOL; hydro re-licensing collaboration; joint fact-finding; conflict management awareness training; public participation training; Interagency Collaborative Conservation Training; and DOI Dialogue on Collaborative Conservation and Cooperative Resolution.

CADR Website

Close coordination of efforts between CADR and SOL

Additional recommendations:

Bureau designations of full-time BDRS with relevant background, skills and experience to assist bureau employees in identifying and assessing ECR opportunities, in early planning and design of effective processes, in coaching on participation/negotiation/advocacy in an ECR process, and to provide internal coordination and support to external neutrals.

CADR office continues to identify and initiate the design of two cross-cutting pilot or demonstration projects per year in coordination with bureaus and offices and field personnel.

Consistent tracking and evaluation mechanisms throughout DOI will be developed in FY 05.

Greater focus on promoting use and making the case for value added by ECR.

11. Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:

- **Any benefits derived from using ECR; and,**
- **Any costs associated with using or not using ECR.**

Las Cienegas National Recreation Area, Arizona (BLM). In 1996, the BLM formed a group, consisting of BLM, Arizona State agencies, user groups, grazing and mining interests, as well as conservation interests, to develop a land use plan for what was to become the Los Cienegas National Recreation Area. A previous effort to bring these groups together in the late 1980's had failed. In this effort, the group used a third-party neutral to apply ECR techniques to help the interests represented in the group to reach consensus on a variety of issues. This effort succeeded in producing a plan for the Las Cienegas NRA that was used by Congress as a basis for the legislation which statutorily created the Las Cienegas NRA.

Swan Valley Conservation Agreement. In 1995, the Fish and Wildlife Service, the U.S Forest Service, along with several agencies of the State of Montana, and a private land owner, formed a group to develop an agreement to protect endangered grizzlies in Swan Valley, Montana. The group used the services of a third-party neutral to help it reach consensus on an agreement that met the interests of all parties, and produced a plan that allowed for the survival of these threatened grizzlies.

Fire Island Negotiated Rulemaking (NPS) involved all stakeholders in the negotiation of new vehicle use regulations on Fire Island National Seashore lands. Costs associated with this negotiated rulemaking process were time delays with processing the FACA charter, cost of co-mediators to conduct and report on a preliminary conflict assessment and to facilitate the negotiated rulemaking process, cost of travel and meetings of the negotiating committee, and time of NPS managers and other committee members to engage in the process. The benefits derived were greater understanding of the variety of interests and impacts of the driving regulations, and the development of a new regulation by consensus of all stakeholders which met the needs of the National Park Service, State government, and the 17 local communities including seasonal and permanent residents, local law enforcement, private business, visitors, etc.

Middle Gila Conservation Partnership (BLM) is developing a transportation plan to manage a recreation area. The Middle Gila "pilot study" area is a region in south central AZ comprised of 100,000 acres of BLM lands, AZ State lands, and Tonto National Forest lands. The BLM Tucson Field Office has established a working group to guide the management of this popular recreation area in south central AZ. The Partnership includes representatives of federal land management agencies, AZ Game and Fish, environmental groups, BLM RAC members, and motorized recreation groups, among others, as well as the general public. BLM's Tucson Field Office has begun formal land use planning in the area. Resources and uses on the land include

an endangered owl, the White Canyon Wilderness and Area of Critical Environmental Concern, hiking, motorized recreational use, and cultural and mineral resources (copper).

12. If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.

The Office of the Solicitor is identifying examples of litigation that resulted from an ECR process that failed to reach agreement or to resolve the matter. There are obviously examples where ECR did not lead to agreement or resolution of a matter, and either additional benefits were achieved, and/or additional costs were incurred. Rather than provide specific case examples, we will share some of the lessons reported from these experiences:

1. The internal communication and coordination work to be done by an agency in deciding whether to engage in ECR, to prepare for the negotiation process and to keep internal constituencies informed and engaged is as important and as challenging as the negotiation/mediation process with the other parties.
2. There is a need for greater understanding of FACA and how it impacts the decision to engage in a collaborative decision-making process or the design of a collaborative decision-making process.
3. It is critical to build the capacity of all parties expected to participate in a collaborative problem-solving or ECR process.
4. The parties will often narrow the issues to be resolved or generate good information for the future even when ECR did not produce an agreement.
5. The parties must clearly identify and agree upon the boundaries of the negotiation process at the outset. A clear understanding and common expectations about the process are very important.
6. There are circumstances when investing in a situation or conflict assessment can help the parties to determine whether an ECR process is appropriate, feasible and likely to be successful.
7. There is value and need for both upstream and downstream applications of collaborative problem-solving and ECR. An issue or situation that cannot be resolved through ECR early, could still be successfully resolved further downstream, e.g. in context of litigation or on appeal.
8. These processes often lead to increased understanding of the resource issues (including the science, laws and regulations) and improved understanding of each parties' interests and better relationships, all of which may help resolve other conflicts in the future even if the issue at hand is not resolved.

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Department/Agency Responding: Department of the Navy (DON)

Name of Official Responding: John Dietrich

Position: Deputy Dispute Resolution Specialist (DDRS)

Contact Information: phone (202) 685-6990 email john.dietrich@navy.mil

Date Submitted: October 7, 2004

- 1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?**

The Principal Deputy General Counsel serves DON as the "Dispute Resolution Specialist (DRS). As a collateral duty the DRS is responsible for the overall ADR policies and initiatives within DON. The DRS oversees the DDRS, a fully funded position responsible for the day-to-day coordinating of ADR within DON.

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2. Is there another person in your department/agency specifically assigned responsibility for ECR?

Yes. Bob Manley, ADR Attorney, is specifically assigned responsibility for ECR.

3. How is ECR funded?

- a. Are there specific appropriations focused on ECR?**
- b. Are ECR costs considered administrative costs charged to other program costs?**
- c. Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?**

- a. No. Appropriations to the DON ADR Program are Operation and Maintenance, Navy (O&M,N) appropriations. Appropriations for Environmental Restoration Partnering Program facilitation are Environmental Restoration, Navy (ER,N) appropriations managed by Naval Facilities Engineering Command.
- b. No.
- c. Some funding is allocated through the DON ADR Program, for the purpose of ADR awareness, training, and seed funding. When a specific case moves beyond the seed funding stage, the (DON) command stakeholder becomes responsible for the cost.

4. What are ECR funds used for?

- a. ECR program development, education and advocacy**
- b. Specific ECR projects**
- c. Other**

DON ADR Program environmental funds are used for program development, education, and specific projects as required.

5. What other resources are available to support ECR?

The Naval Civil Engineer Corps Officers School (CECOS) offers the Environmental Negotiation Workshop tuition-free to all DOD. This three-day class provides instruction on the negotiating and communication skills necessary to establish productive relationships and achieve beneficial agreements with regulatory and public stakeholders.

6. What specific incentives/disincentives exist within your Federal agency for using ECR?

DON Instruction mandates early consideration of ADR in conflict resolution. Experience demonstrates that ADR can be successfully used in environmental litigation to help the DON achieve the most favorable result possible under the circumstances of the particular case. The degree to which ADR is deemed a viable alternative depends largely upon the degree to which the opposing party is willing to compromise. For example, in defensive CERCLA cases where the parties are debating the numerical allocation of liability, there is significant potential for ADR use. We are also considering ADR for use in our affirmative CERCLA cases when discussions have progressed to a point where it is appropriate. We believe it may be useful because, to date, the Navy and opposing counsel have widely divergent views and

interpretations of novel legal questions. To the extent each side persuades the other that they have significant litigation vulnerabilities and neither side wishes to set negative precedent, each side may be amendable to ADR to achieve share allocation.

In addition, DON guidance on ADR at the Command level (major DON organization, such as Naval Sea Systems Command) supports ECR as one ADR technique.

- 7. What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, The National Environmental Policy Act)?**

None reported.

- 8. When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?**

To date resource problems, such as travel budgets for face-to-face meetings with parties in negotiation or the cost of paying neutrals, have not been reported. However, there is the potential for having limitations placed on the use of ECR in a litigation setting due to ongoing funding limitations being experienced by federal agencies.

- 9. What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?**

As previously mentioned defensive and affirmative CERCLA cases have potential for the use of ECR in the next four years. Other possibilities for ECR use include decommissioning federal facilities, marine acoustics issues, and joint regulatory projects with EPA involving water pollution.

- 10. Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?**

During the past year the DON ADR Program has become more involved in monitoring DON environmental litigation, and providing assistance and recommendations in considering ADR options.

11. Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:

- Any benefits derived from using ECR; and,
- Any costs associated with using or not using ECR.

A.) Rollins Environmental Services (NJ) Inc., et al. v. United States, et al. (Bridgeport Rental and Oil Services Superfund Site), C.J.J. No. 92-1253 (SSB)

This was a major CERCLA contribution case brought by private PRPs to recover response costs incurred at a superfund site in New Jersey. After two years of court appointed mediation, the case was ultimately settled in 1997 for \$221.5 million to be split among the parties. The mediation performed by a husband and wife team helped to resolve the many complex and difficult issues involved with the case in a more timely and more efficient manner than had full blown litigation been conducted. Exact costs of the mediation are unknown, but there were many mediation sessions conducted over a two-year period. The hourly rate for the mediators was reputed to be around \$300 per hour. The U.S. share of mediation costs was paid by DOJ.

B.) The March Coalition Fund, et al. v. United States Department of Defense, et al. (MCAS Miramar), S.D. Cal. No. 97-CV-0155 S(LAB)

This was a case brought under NEPA and the CAA trying unsuccessfully to stop the movement of Marine Corps aircraft from the closing MCAS Tustin and MCAS El Toro to the new MCAS Miramar in San Diego, California. Mediation by a Federal Magistrate Judge was provided for in the settlement agreement dispute resolution process. After the settlement agreement was signed, plaintiffs alleged that a provision of the agreement had not been complied with and called for mediation. After mediation briefs were submitted and an informal hearing held, the Magistrate Judge declared from the bench that “the Marines win and you (i.e. plaintiffs) lose and that is what I will recommend to the Judge.” Plaintiffs made no appeal to the assigned Judge and that was the end of the issue. The mediation cost nothing, but travel costs and attorneys’ time.

C.) Washington Navy Yard RCRA Violations Mediation. This mediation with an EPA administrative law judge (ALJ) was instrumental in breaking a deadlock in negotiations between the EPA and the DON over alleged violations of the Resource Conservation and Recovery Act (RCRA) at the Washington Navy Yard and Anacostia Naval Station in Washington, D.C. Acting as an ADR neutral, Judge Stephen J. McGuire conducted a series of teleconferences over a period of approximately five months that resulted in four consent agreements and consent orders (CACOs). The parties “agreed to engage in ADR because they both viewed the issues involved as ‘impossible’ to resolve,” says Judge McGuire, but the ADR process provided to be so successful that the parties continued teleconferencing to negotiate the specific language of the CACOs after the ADR itself was over.

The case began with a multi-media compliance evaluation inspection of the sites conducted by EPA Region 3 and DC in June 1995. The inspection report led to the issuance of four administrative complaints on September 30, 1996, alleging a large number of violations of

RCRA Subtitle C hazardous waste management and Subtitle I underground storage tank (UST) provisions, including record keeping, reporting, corrosion protection, closure, corrective action, and training requirements. The two hazardous waste management complaints also sought total civil penalties of between \$600,000 and \$700,000, depending on the method of calculation. The parties managed to reach agreement on some issues, but they reached impasse on other complicated issues concerning training requirements, corrective action procedures, and penalties. With the benefit of Judge McGuire's mediation, however, the parties finalized CACOs in May and August 1998 that resolved outstanding hazardous waste management and UST issues, established workable training and corrective action processes, reduced civil penalties to a total of only \$69,000 in the hazardous waste management cases, and precluded imposition of any penalties in the UST cases.

When Judge McGuire was assigned the case in November 1997, he scheduled weekly teleconferences involving attorneys from Region 3, EPA Headquarters, and the Office of General Counsel at the NAVFAC, Atlantic Division in Norfolk, Virginia. He asked the parties to forget everything that had happened prior to the ADR process and to focus on points that were not in dispute. Judge McGuire gave the participants "homework" assignments on issues to be addressed at the next teleconference. His goal was to get the parties out of trial mode and to focus on clarifying factual issues and their respective concerns about the case. Clearly Judge McGuire was critical in bringing the EPA and DON together with a teamwork approach that proved successful.

- Benefits: 1.) Penalty reduced by 90%
2.) No Penalty in UST case

D.) *Anacostia Watershed Mediation.* On 8 December 2000, EPA gave public notice of a revised storm water permit for the WNY. This public notice followed four years of legal wrangling, with ultimate resolution after four months of ADR. It was the first time the DON used ADR to resolve disputed issues relating to an NPDES storm water permit.

In May 2000, EPA issued a final NPDES storm water permit for the WNY. In July 2000, the DON appealed the permit to the Environmental Appeals Board (EAB), the first appeal of an NPDES permit filed by the DON at the EAB. The appeal challenged the certification and issuance of the permit and alleged, in part, that certain permit conditions involving effluent limits, monitoring frequency, parameters, and additional study requirements were based on erroneous findings of fact, conclusions of law or involved significant policy matters warranting discretionary review. The Anacostia Watershed Society (AWS), represented by Earthjustice (formerly the Sierra Club Legal Defense Fund, which settled a NPDES storm water permit for the WNY) also appealed the permit. The DON, EPA, the District of Columbia (DC), and AWS began ADR with mediator John Bickerman on contested permit terms in August 2000. They reached agreement in principle by November, and filed necessary legal documents to dismiss the case at the EAB by the court-imposed December 2000 deadline.

The mediation process produced an environmentally protective storm water permit uniquely suited for the WNY. The permit recognizes the interests of each party to the mediation. The reduced monitoring requirements represent considerable cost savings over the five-year

permit period yet will continue to address EPA, DC and AWS's concerns regarding past contamination found at WNY outfalls. The retention of some effluent limits and withdrawal of others recognized EPA's developing policy to monitor water quality by imposing such limits, AWS and especially Earthjustice's interest in imposing more effluent limits at all sites on the Anacostia, and the DON and DC's interest in eliminating effluent limits on substances such as fecal coliform whose presence in the river is beyond an individual permittee's control. The revised deadlines and requirements for EPA/DON coordination on a mixing zone study honor EPA, DC and AWS's interest in performance of such a study, while recognizing the DON's concerns regarding cost, coordination, and EPA review deadlines.

- Benefits: 1.) Lower costs because of concessions on sampling locations
sampling frequency, and contaminants samples, and
2.) Greater respect and understanding for specific viewpoints.

12. If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.

Eveready Battery Co. v. United States, et al. (Burgess Bros. Site), D. Vt. No. 94CV235

This was a CERCLA case brought to recover an alleged \$17 million in response costs at a site in Virginia. Early Neutral Evaluation was mandatory. The ENE was slow to occur because of difficulty by the court in finding an evaluator. The evaluator finally chosen was a torts attorney who was not familiar with CERCLA litigation nor litigation involving the United States and the role of the Department of Justice. The ENE was not helpful other than providing an opportunity to listen to opposing counsel express their view of the case. Costs incurred were associated with several attorneys traveling to Vermont for the ENE session held on a Saturday morning.

**Survey of Federal Departments and Agencies on
Use of Environmental Conflict Resolution**

Prepared by the U.S. Institute for Environmental Conflict Resolution
on behalf of the
Interagency ECR Initiative
August 25, 2004

Please circulate these questions on use of environmental conflict resolution (ECR)⁴ within your department or agency to headquarters and field offices and to legal departments and program offices as appropriate. The deadline for return of surveys is **September 30, 2004**. For further information on the survey or this ECR initiative, please contact Kirk Emerson or Cherie Shanteau at (520) 670-5299 or Dinah Bear at (202) 395-7421. Please return responses by email to Pat Mahalish at mahalish@ecr.gov.

Department/Agency Responding: Federal Aviation Administration

Name of Official Responding: Pat Walenga

Position: Program Analyst

Contact Information: phone 202-267-5269 email pat.walenga@faa.gov

Date Submitted: 9/28/04

1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?

Jerome Jones is the Associate Chief Counsel for ADR & the FAA's designated dispute resolution specialist. He is located within the Office of the Chief Counsel. The principal role of the DDRS is to assist the Administrator in implementing the provisions of the Administrative Dispute Resolution Act of 1996, to develop agency ADR policy, and to increase the understanding and use of ADR techniques within the FAA. The DDRS also provides guidance, expertise, and support to ADR programs managers, ADR coordinators, neutrals, and others involved in ADR and conflict management. The position is fully funded.

⁴ Environmental Conflict Resolution (ECR) is defined for the purposes of this interagency initiative and this survey to mean assisted multi-party negotiations in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. These processes differ from conventional agency decision making by engaging affected interests and agency decision makers more directly in collaborative problem solving. Assistance from impartial third parties (whether internal or external facilitators or mediators) adds value when addressing complex, high conflict or low trust settings. ECR processes can be applied at the beginning of a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicting interests between federal, state, local, tribal and industry parties where a federal agency has ultimate responsibility for decision-making. The principles that guide ECR are derived from professional experience and research in interest-based bargaining, alternative dispute resolution and environmental mediation, consensus building, and collaborative management.

2. **Is there another person in your department/agency specifically assigned responsibility for ECR?**
No.
3. **How is ECR funded?**
 - a. **Are there specific appropriations focused on ECR?**
 - b. **Are ECR costs considered administrative costs charged to other program costs?**
 - c. **Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?**We currently do not have an environmental conflict resolution program.
4. **What are ECR funds used for?**
 - a. **ECR program development, education and advocacy**
 - b. **Specific ECR projects**
 - c. **Other**
5. **What other resources are available to support ECR?**
6. **What specific incentives/disincentives exist within your Federal agency for using ECR?**
7. **What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, The National Environmental Policy Act)?**
8. **When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?**
9. **What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?**
10. **Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?**
11. **Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:**
 - **Any benefits derived from using ECR; and,**
 - **Any costs associated with using or not using ECR.**
12. **If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.**

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Department/Agency Responding: U.S. EPA

Name of Official Responding: Jeff Lape

Position: Dispute Resolution Specialist/Director, Conflict Prevention and Resolution Center

Contact Information: phone 202.564.6055 email lape.jeff@epa.gov

Date Submitted: October 1, 2004

1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?

The formally assigned leadership for alternative dispute resolution is located in EPA's Office of General Counsel. The position title is Dispute Resolution Specialist (DRS). The DRS also serves as Director of EPA's Conflict Prevention and Resolution Center (CPRC) and as Associate General Counsel for ADR. The DRS is responsible for implementing the provisions of the Administrative Dispute Resolution Act (ADRA) of 1996 and EPA's ADR policy issued pursuant to the ADRA. The DRS position is fully funded.

⁵ Environmental Conflict Resolution (ECR) is defined for the purposes of this interagency initiative and this survey to mean assisted multi-party negotiations in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. These processes differ from conventional agency decision making by engaging affected interests and agency decision makers more directly in collaborative problem solving. Assistance from impartial third parties (whether internal or external facilitators or mediators) adds value when addressing complex, high conflict or low trust settings. ECR processes can be applied at the beginning of a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicting interests between federal, state, local, tribal and industry parties where a federal agency has ultimate responsibility for decision-making. The principles that guide ECR are derived from professional experience and research in interest-based bargaining, alternative dispute resolution and environmental mediation, consensus building, and collaborative management.

2. Is there another person in your department/agency specifically assigned responsibility for ECR?

No, only the DRS has leadership responsibility for ECR at EPA.

3. How is ECR funded?

a. Are there specific appropriations focused on ECR? Yes.

b. Are ECR costs considered administrative costs charged to other program costs?

No

c. Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program? Both

4. What are ECR funds used for?

a. ECR program development, education and advocacy Yes

b. Specific ECR projects Yes

c. Other EPA's usage of ECR funds is captured by the above two categories.

5. What other resources are available to support ECR?

External ECR process participants (e.g., other federal agencies, private sector regulated community) have contributed funding to support projects in some cases.

6. What specific incentives/disincentives exist within your Federal agency for using ECR?

Specific incentives for the use of ECR at EPA include the clearly articulated support of Agency leadership for expanded use of collaborative environmental problem solving and the wide range of ECR services available through the Conflict Prevention and Resolution Center (CPRC). Among the primary disincentives to greater use of ECR at EPA are the availability of funding to support ECR projects and the perception that using ECR may prevent program managers from meeting important deadlines (e.g., mandated by Congress or the courts).

7. What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, The National Environmental Policy Act)?

The following general statutory authorities are most directly involved when using ECR at EPA, listed together with challenges they pose for effectively using ECR (if any):

Administrative Dispute Resolution Act of 1996 (ADRA) – One challenge is that inconsistent interpretation of the ADRA's provisions for engaging neutrals without full and open competition have led to inconsistent application of the Congressional intent to expedite the hiring of neutrals. Another issue that some have raised is that the ADRA's confidentiality provisions regarding communications between parties (e.g., during joint sessions) can lead to confusion and difficulty in identifying confidential communications.

Negotiated Rulemaking Act – this act poses no specific challenges to the effective use of ECR.

Federal Advisory Committee Act (FACA) – A fundamental challenge posed by the administration of FACA is that agencies are limited by quota to a certain number of FACA committees. The FACA committee quota restricts the number of situations in which the Agency can use ECR to reach consensus. In addition, the chartering, Federal Register Notice, and record-keeping requirements can pose a significant administrative time barrier to the effective use of ECR in the minds and/or experience of program personnel serving as a disincentive for its expanded use. In addition, it is unclear how and whether to apply FACA to site or facility specific consensus building efforts that do not involve enforcement, permitting, or litigation.

8. When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?

Three resource issues typically arise when considering the use of ECR at EPA: 1) the availability of travel funds for ECR process participants; 2) funding for neutral third party services; and 3) availability of program staff to support FACA record keeping and chartering requirements, for those ECR processes conducted under FACA.

9. What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?

ECR is potentially applicable to the full range of environmental issues. As federal agencies, we should emphasize the use of ECR for interagency disputes to increase government efficiency and reduce the burden on taxpayers caused by such disputes. The CPRC has already successfully promoted the use of ECR in standard setting and in environmental permitting disputes involving multiple federal agencies.

10. Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?

Yes, EPA is taking steps to increase the use of ECR. In 2004, EPA launched an internal initiative to promote the use of collaboration to solve shared environmental problems. The initiative is expected to result in a statement of principles and an action plan to further the use of collaboration within the Agency.

In addition, , the CPRC will embark in FY 2005 on an ambitious outreach effort to EPA HQ and Regions with the goals of expanding the Agency's understanding and use of ECR techniques in a range of environmental programs.

11. Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:

- a. Any benefits derived from using ECR; and,**
- b. Any costs associated with using or not using ECR.**

EPA provided two case reports in the Briefing Report for Federal Department Leadership – for the Combined Sewer Overflow Policy Dialogue and All Appropriate Inquiries Negotiated Rulemaking -- that detail significant benefits gained from those processes. EPA is also

currently engaged in a study with the Hewlett Foundation and the State of Oregon as partners to systematically quantify the benefits and costs of ECR. This study is expected to result in a methodology that will help the Agency assess the costs associated with using or not using ECR.

12. If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.

EPA provided funding support for a situation assessment and initial phase of an ECR process in northeastern Pennsylvania concerning a Congressionally appropriated grant for sewer construction that did not lead to agreement. After initially committing to initiating the ECR process, one set of parties withdrew because they believed they could achieve a more satisfactory solution through litigation. It is unclear what benefits were derived from the process and what additional costs may have been incurred.

**Response to the U.S. Environmental Conflict Resolution's
Survey of Federal Departments and Agencies on
Use of Environmental Conflict Resolution**

Department/Agency Responding: Federal Energy Regulatory Commission

Name of Official Responding: Richard Miles

Position: Director, Dispute Resolution Service

Contact Information: phone: 202 502-8702 email: richard.miles@ferc.gov

Date Submitted: October 5, 2004

- 1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g., the designated dispute resolution specialist) located (e.g., in policy office or general counsel office or other location)? Describe the position(s) title and responsibilities. Is the position fully funded or collateral duty?**

The leadership for alternative dispute resolution (ADR) at the FERC is its Dispute Resolution Specialist who serves also as the Director of its Dispute Resolution Service (DRS). The Director of the DRS is a full time position committed solely to alternative dispute resolution. The Director is responsible for managing the DRS which was charged in February 1999 to foster the increased use of ADR in all subject areas that the Commission regulates. The DRS has two major functions: to perform ADR services involving internal and external disputes, e.g., convening, facilitation, mediation; and to promote and enhance the use of ADR within and outside the Commission before and after disputes are filed with the Commission. The DRS is a small team-based unit that is not involved in the decisional processes on substantive issues, does not advocate positions and does not conduct investigations. The DRS also provides training and guidance for other offices in the Commission, such as the Office of the General Counsel and the Office of Energy Projects, which routinely engage in negotiations, facilitation, and other ADR functions.

- 2. Is there another person in your department/agency specifically assigned responsibility for ECR (see definition below)?**

Yes, the Manager of FERC's Enforcement HotLine addresses ECR conflicts as well as transactional and market related conflicts. The Enforcement Hotline was formed in 1987 to attempt to resolve complaints informally prior to a formal filing of a complaint. The Enforcement Hotline invites market participants and the general public to informally call, email or write the Hotline to complain or report market activities or transactions that may be an abuse of market power, an abuse of an affiliate relationship, a tariff violation, or another possible violation by a FERC regulated entity. Through the use of the ADR process known as early neutral evaluation, the Enforcement Hotline informally resolves disputes in matters within the Commission's jurisdiction without litigation or other formal, lengthy proceedings. Hotline staff attorneys have been very effective in resolving disputes, including landowner/pipeline disputes, tariff disputes, market disputes and disputes over procedural

questions. The Commission's Office of the General Counsel regularly designates members of its staff as "separated" (or non-decisional), to serve as facilitators or advisors for groups attempting to settle disputed proceedings, such as hydropower licensing cases.

3. How is ECR funded?

a. Are there specific appropriations focused on ECR?

No.

b. Are ECR costs considered administrative costs charged to other program costs?

Yes, except for the funds allocated to FERC's DRS.

c. Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?

FERC appropriations for ECR are to program areas, not for specific cases.

4. What are ECR funds used for?

a. ECR program development, education and advocacy

Yes. Funds from FERC's budget have been spent on the use of outside trainers in conflict resolution as well as purchasing educational materials. The DRS for its conflict resolution training program uses its funds to purchase educational materials, e.g., texts, videos, and role plays.

b. Specific ECR projects

Funds allocated to the DRS support its intervention as third-party neutrals in specific ECR projects.

c. Other

5. What other resources are available to support ECR?

FERC's Administrative Law Judges are also available to perform as settlement judges in ECR disputes. All have been trained in mediation and approximately 80 percent of cases assigned to hearing are resolved through the use of the settlement judge process.

During the pre-filing process for hydroelectric projects, it is common for these collaborative processes to be aided by a facilitator. These facilitators are typically funded by the owner of the hydroelectric project. If a mediator from the private sector is used, the funding for the mediator is by agreement of the parties to the dispute. As noted above, staff from the Office of the General Counsel also sometimes serve in these roles.

6. What specific incentives/disincentives exist within your Federal agency for using ECR?

FERC has a long history of advocating settlements to avoid litigation and has taken a number of steps to promote the settlement process. Managers at FERC recognize the value of ECR in processing the workload.

7. What statutory/regulatory frameworks/authorities are involved when using ECR and what specific challenges do they pose for effectively using ECR (e.g., the Federal Advisory Committee Act, the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, the National Environmental Policy Act)?

There are a number of statutory/regulatory/authorities that may apply to an ECR matter before FERC. They include the Federal Power Act, the Natural Gas Act, the National Environmental Policy Act, the Clean Water Act, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Wild & Scenic Rivers Act, the Wilderness Act, and the Federal Lands Protection Management Act. These statutes do not inhibit FERC's use of ECR.

8. When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use (e.g., travel budgets for face-to-face meetings with parties in negotiation)?

The most common issue that participants in an ECR conflict face is the conflicting schedules that may develop between competing work assignments. FERC Staff has been able to attend ECR sessions when their presence is required.

9. What substantive program areas (including areas for interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g., decommissioning federal facilities or wetlands mitigation)?

There are no substantive program areas at FERC that are not engaged in the use of ECR when appropriate. FERC staff also expects increased use of ECR over the next four years.

10. Is your department/agency taking steps to increase the use of ECR? If so, please describe. What additional recommendations do you have for increasing the use of ECR in your department/agency?

FERC's technical staff conducts numerous outreach and prefiling sessions in advance of a filing made at the Commission. At these sessions, FERC staff encourages the use of collaborative processes in the preparation of an application for a pipeline certificate or hydroelectric license. FERC's DRS also champions the use of ADR internally and externally. The DRS provides and assists others in providing education and training to staff and external groups on the benefits of ADR. The DRS members help to screen disputes to determine if ADR application is appropriate, convene sessions to initiate ADR processes, perform ADR services if requested (e.g., facilitation, mediation), and evaluate completed

ADR processes. As part of its Outreach efforts, the DRS has met, and will meet with groups to explain what ADR is, why it should be used, how it can be initiated with the help of the DRS, and the benefits a third party neutral brings to the process.

As noted, FERC's DRS has implemented training program on conflict resolution to aid staff in ECR conflicts. The Commission has a number of different resolution processes that are available to parties and staff in cases with disputed issues. These processes include: technical conferences, alternative licensing and certificate processes, hearings, unassisted negotiations, settlement judge proceedings, mediation, and facilitated negotiations. Staff's role in these processes can be critical and varied depending on the process selected, the issues in controversy, and/or the dynamics created by the participants. Staff's value in these processes can only increase if they are trained in conflict resolution. The conflict resolution program will include training on: An Introduction to Conflict Resolution and ADR; Conflict Assessment: Designing and Maintaining a Successful Collaborative Process; An Introduction to Negotiations: How to Facilitate; Early Neutral Evaluation: and Mediation – understanding your role and that of the mediator. Other courses or brown bag presentations will be tailored to more discrete areas. For example, training could be developed that highlights confidentiality, ethics, barriers to ADR, agreement drafting, creating value, communications skills, and cultural and gender differences

11. Please identify and describe at least two cases (either already in the Briefing Report for Federal Department Leadership or additional ones) that best illustrate:

- Any benefits derived from using ECR; and,
- Any costs associated with using or not using ECR.

Indian Pond Project No. 2142
FPL Energy Maine Hydro LLC

Indian Pond Project No. 2142, also known as the Harris Station, is located on the upper Kennebec River approximately 12 miles above The Forks and 10 miles below Moosehead Lake. The Indian Pond project is Maine's largest hydroelectric project with a capacity of 88 MW. It is a peaking plant, primarily used when electricity demand is at its highest. The dam can produce enough electricity to power a community the size of the City of Portland.

The project is licensed to FPL Energy Hydro, Maine LLC. (FPL). Construction of the dam began in 1952, was completed in 1954 and went on line to full operation in 1955. The Kennebec Gorge is located immediately downstream of the dam and is one of Maine's most outstanding natural features. Project tailwaters are known for its native brook trout fishery and Indian Pond reservoir supports a small mouth bass fishery. The area below the dam is known for its Class IV-V whitewater rapids with approximately 60,000 whitewater rafters from below the dam in 2000.

The current license expired on December 31, 2001. The preparation for a new license started in 1996 and approximately 25 studies were conducted in the areas of fisheries, water quality, recreation, cultural resources, and terrestrial and wildlife resources. In 1999, unassisted settlement negotiations began among the licensee and interested parties. In the fall of 2000,

the Federal Energy Regulatory Commission' Dispute Resolution Service (DRS) was invited to mediate the final issues that had not been resolved through unassisted negotiation. These issues included wetland protection, fishery protection, recreational use below the dam, and flow releases.

On July 25, 2001, FPL informed the Commission that a comprehensive agreement to protect the diverse natural resources on Indian Pond and along the Kennebec River had been reached. Parties to the settlement include FPL, 5 federal and state government agencies, and 23 private parties comprised of conservation groups, rafting and other commercial interests. The Parties submitting the settlement offer were:

- FPL
- Appalachian Mountain Club
- American Whitewater Affiliation
- New England Flow
- The Forks Chamber of Commerce
- Kennebec Valley Trails
- Maine Professional River Outfitters Association
- Maine State Planning Office, Department of Conservation and Department of Inland Fisheries and Wildlife
- Maine Trout
- Trout Unlimited
- US Department of Interior, U.S. Fish and Wildlife Service
- US Department of Interior, National Park Service
- Maine Whitewater
- Professional River Runners
- Magic Falls Rafting
- Unicorn Expeditions
- Moxie Outdoor Adventures
- Wilderness Expeditions
- New England Outdoor Center
- Windfall Outdoor Center
- Northern Outdoors
- Crabapple Whitewater, Inc.
- North American Whitewater
- Downeast/Adventure Bound
- Three Rivers Whitewater, Inc.
- North Country Rivers
- The Indoor Outdoor Center

An FPL official called the settlement “a historic agreement affecting the operations of Maine’s largest hydropower station. By collaborating with all of the stakeholders in advance of the FERC licensing decision we have enhanced the multiple use benefits of this project.” He added that, “this agreement provides for river flows that support fish and wildlife habitat and protects lands upstream and downstream of the dam. It also provides for a wide array of

recreational uses, and enables a critical source of clean energy to continue to produce power for Maine and New England electrical consumers far into the future.”

One participant praised the “commitment to success by all the participants and FPL Energy [which] means electric power production will continue, along with a better fishery, stability for the rafting industry, greater whitewater boating opportunities and significant protection of undeveloped waterfront lands- no small feat.”

Another participant found it refreshing that “so many parties with a broad range of often conflicting goals and interests [could] stay together long enough in a settlement process to generate an outcome as balanced as this Harris Station settlement is.”

The agreement obviated the need for a lengthy Commission hearing and likely rehearing and possible court appeal of the decisions in the proceeding. Most important, the parties, which will have a continuing relationship, were able to meet their interests and establish a good precedent for future dealings with each other.

Millennium Pipeline Company and the City of Mount Vernon, New York
Collaboration Process in New York a Success for Community and Pipeline Project

The DRS staff’s mediation efforts proved successful in a highly contentious pipeline certificate proceeding in New York community. The mediation was initiated following a December 21, 2001, Interim Order issued by the Commission that authorized Millennium Pipeline Company to construct and operate a pipeline from Lake Erie to Consolidated Edison’s high-pressure line in the City of Mount Vernon, New York. The Interim order, however, did not certificate a specific route for the Millennium pipeline through Mount Vernon because the citizens of that City raised numerous, specific concerns about pipeline construction through their community and opposed the proposed pipeline in their community. The Interim Order requested that Millennium and the elected officials, interested parties and citizens in Mount Vernon to negotiate over an alternative route. The Commission also offered the services of its DRS to the parties.

The parties accepted the Commission’s offer and in January 2002, the Commission’s DRS initiated a mediation process that continued over the next three months in the Mount Vernon area. Several issues were raised including the routing of the pipeline, safety, economic impacts, and environmental justice. In early May 2002, Millennium and the Mayor and the City Council of Mount Vernon agreed on a revised pipeline route through Mount Vernon.

The Mount Vernon elected officials called the agreement a major victory for the City because it addressed a number of important concerns. Millennium also claimed that the agreement met all of its interests and stated that it remained committed to working closely with Mount Vernon City officials and its citizens. Both U.S. Senators from New York filed letters commending the efforts of the Commission and its Dispute Resolution Service in support of the parties’ negotiation efforts.

12. If possible, provide an example of a case where ECR did not lead to agreement or resolution of a matter, detailing the reasons why, and what, if any, other benefits were derived or other costs were incurred.

A discussion of unsuccessful application of ECR would require providing information that is either confidential or potentially prejudicial to parties actively engaged in ongoing disputes. For these reasons, no examples are provided.

* Environmental Conflict Resolution (ECR) is defined for the purposes of this interagency initiative and this survey to mean assisted multi-party negotiations in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. These processes differ from conventional agency decision making by engaging affected interests and agency decision makers more directly in collaborative problem solving. Assistance from impartial third parties (whether internal or external facilitators or mediators) adds value when addressing complex, high conflict or low trust settings. ECR processes can be applied at the beginning of a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicting interests between federal, state, local, tribal and industry parties where a federal agency has ultimate responsibility for decision-making. The principles that guide ECR are derived from professional experience and research in interest-based bargaining, alternative dispute resolution and environmental mediation, consensus building, and collaborative management